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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

NO. 401

UNITED STATES OF AMERICA
for the use of H. W. MOSELEY, d/b/a MOSELEY PLUMBING AND HEATING COMPANY,
Petitioner

v.

ELECTRONIC & MISSILE FACILITIES, INC., formerly FIVE BORO CONSTRUCTION CORPORATION, and CONTINENTAL CASUALTY COMPANY,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit, is reported at 306 F. 2d 554 and appears in the record at pages 125-136. The opinion of the District Court is contained in the record at pages 120-124.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1). Certiorari was granted December 3, 1962.

STATUTES INVOLVED

The questions presented involve the United States Arbitration Act (9 USCA, Sections 1, 2 and 3), and the venue provision of the Miller Act (40 USCA 270-b).

Section 1 of the Arbitration Act makes the Act applicable to transactions involving "commerce among the several states." Section 2 of the Arbitration Act provides that in a "contract evidencing a transaction involving commerce" agreements to arbitrate "shall be valid, irrevocable and enforceable." Section 3 of the Arbitration Act provides for the granting of a stay "if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration."

The three sections of the Arbitration Act involved are set out in their entirety in Appendix "A" to this brief.

The provision of the Miller Act in question provides that a person furnishing labor or material in the prosecution of certain government projects "shall have the right to sue on such payment bond . . . and to prosecute said action to final execution and judgment . . . Every suit instituted under this section shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed, and not elsewhere . . ."

Section 2 of the Miller Act (40 USCA 270-b) is set out in its entirety in Appendix "B" to this brief.

QUESTIONS PRESENTED

Basically, three questions are presented: (1) Does the venue or jurisdictional provision of the Miller Act (40 USCA 270-b) repeal by implication the United States

Arbitration Act (9 USCA 1-3), with respect to Miller Act transactions;

(2) Do the contracts upon which petitioner's action is based evidence a transaction involving commerce within the meaning of the United States Arbitration Act; and

(3) Do petitioner's other contentions raise any substantial federal issue not correctly decided by the Court of Appeals.

STATEMENT OF FACTS

The original complaint in this case was brought under the Miller Act, Title 40, USCA 270 (a-d). The facts are that the respondent, Electronic & Missile Facilities, Inc., formerly Five Boro Construction Corporation, bonded by respondent, Continental Casualty Company, (both of whom will be referred to as "respondent"), was prime contractor with the United States Government for the construction of Nike Hercules Facilities at Robins Air Force Base and Turner Air Force Base within the Middle District of Georgia. Petitioner, as a subcontractor of respondent assumed under two written subcontracts a certain portion of the work, including the plumbing, heating and air conditioning. (R. 17)

The complaint which sought to recover approximately One Hundred Twenty-five Thousand ($125,000.00) Dollars (in addition to approximately $405,000.00 which had already been paid) was brought in six counts for breach of two written subcontracts attached to the complaint as exhibits. One subcontract covers the work to be performed at Robins Air Force Base and the other subcontract covers the work to be performed at Turner Air Force Base. The provisions of the two subcontracts are identical, except as to amounts and location, and by

stipulation of the parties may be treated as a single instrument. (R. 50-51)

The various counts of the complaint each alleged that petitioner had fully completed his work and that respondent had instituted arbitration proceedings under the terms of the subcontracts which would require petitioner to arbitrate the dispute over sums alleged to be due petitioner under the subcontracts; and that such arbitration should be restrained by the court in order to allow petitioner to prosecute his claim within the Middle District of Georgia. In the alternative, petitioner sought to rescind the contracts for fraud. (R. 1-17)

Respondent moved to dismiss the complaint for failure to state a claim upon which relief could be granted, and in lieu thereof, moved to stay the proceedings until arbitration could be had in accordance with the express terms and conditions of the subcontracts sued upon. (R. 57)

The case came on for a hearing upon the motion filed by respondent and based upon the pleadings and the depositions and affidavits on file in the case. Such motion was overruled and denied by the District Court on each and every ground, and an existing restraining order preventing arbitration was continued in full force and effect. (R. 120-124)

On appeal the United States Court of Appeals for the Fifth Circuit reversed the order of the trial court and remanded the case to the District Court with direction that the proceedings be stayed for the purpose of arbitration in accordance with the terms of the subcontracts sued upon. (R. 125-136)

SUMMARY OF ARGUMENT

1.

Congress has not indicated any intention to prohibit arbitration of Miller Act cases, because: (1) The two Acts, when construed together, are in perfect harmony. (2) To hold otherwise would work an implied repeal of the Arbitration Act; (3) By legislative history, the venue provisions of the Miller Act are for the benefit of prime contractors and their sureties; (4) This court has held that similar venue provisions may be waived by the parties and do not prevent arbitration; (5) The district court does not lose its jurisdiction in arbitration cases but merely stays its action while arbitration is taking place; (6) There are substantial physical precedents in favor of arbitration and no conflict exists in the decisions of the Circuit Court of Appeals as to the arbitrability of Miller Act cases; and (7) According to a previous decision of this court a Miller Act case is one peculiarly suited for arbitration.

2.

(1) The work to be performed under the present contract evidences a transaction in commerce under the provisions of the United States Arbitration Act, and (2) Where citizens of different states contract to send supervisory personnel across state lines and receive equipment and supplies across state lines, thereby fulfilling a contract for improvements and additions to a military facility already an integral part of a system in commerce, a finding that the transaction is one involving commerce is demanded under previous decisions of this court.

3.

(1) Petitioner's allegations of fraud are insufficient:

(2) By the United States Arbitration Act, contracts to arbitrate become "valid, irrevocable and enforceable", and arbitration is not barred by a general attack alleging fraud, absent an allegation or specific claim that the arbitration provision itself was induced by fraud; and (3) The record demonstrates that petitioner is barred by an election of remedies, he being bound by his decision to proceed on his contract rather than to rescind.

ARGUMENT AND CITATION OF AUTHORITY

I.

Congress did not intend to prohibit arbitration of Miller Act cases.

The contention of petitioner is that no Miller Act suit can be arbitrated and that as to Miller Act suits the United States Arbitration Act has been impliedly repealed. There is nothing in the two Acts themselves which justifies this conclusion and if it is to be drawn it must be found in their legislative history.

The Miller Act came into being in 1935 as a modification of the Heard Act. The Heard Act[1] was originally enacted by Congress to protect the United States Government from defaulting contractors and at the same time to protect suppliers of labor and material from the same eventuality. It is evident from the provisions of the Heard Act that the primary purpose of the Act was the protection of the United States Government. Since the government was compelled to accept the lowest bid, it had no way of selecting only solvent contractors and as a consequence it had no assurance that the contract would be completed, hence, the provisions of the Heard

[1]Act of August 13, 1894, Ch. 280, 28 Stat. 278.

Act requiring a bond in favor of the government conditioned on faithful performance. Collateral to such provision was the further provision that in the event of default the government would bring one suit and unpaid suppliers of labor and material might intervene and recover pro rata their unpaid bills *after* the government had been paid. Since there was but one suit, and for the convenience of everybody, the Heard Act provided that the one suit be brought in the district where the work was performed.

The Heard Act was defective for the reason that unpaid suppliers had to wait, sometimes years, until the government brought its suit, and thus Congress in 1935 enacted the Miller Act. Only two substantial changes were made, the first being the provision that two bonds would be required, one a performance bond in favor of the government and the other a payment bond in favor of subcontractors and materialmen; and, second, the provision whereby unpaid materialmen and laborers might bring a separate suit if they were not paid within ninety days from the date they supplied the last labor and material. In the course of the House Committee hearings,[2] the surety companies argued that the single suit system should be continued so that they might be protected from paying out more than the limits of their bonds, since with separate suits being maintained in many jurisdictions they would be hard pressed to determine the status of payments in relation to the total amount of their bonds. To prevent this, the Miller Act as finally enacted retained the former provision of the Heard Act that all actions would be brought in a district where the

[2]Bonds of Contractors on Public Works, Hearings before the Subcommittee on the Judiciary, 74th Cong., 1st Sess., Serial 4, Mar. 8, 22, Apr. 26, May 3, 1935, pp. 47-48.

work was performed, and as pointed out by the Second Circuit Court of Appeals in the case of *United States* v. *Aetna Casualty and Surety Company*, 2d Cir., 297 F. 2d 665, the venue section of the Miller Act retained "scant utility save as a convenience to the defendants."

It is not disputed that the Miller Act is highly remedial in nature and entitled to a liberal construction and application. It appears, however, that petitioner has obviously confused the relative position occupied by a supplier of labor or material unprotected by a contract with the prime contractor, with that of a subcontractor operating under a written subcontract entered into with the prime contractor. In the former case, a supplier of labor or material must rely on the provisions of the Miller Act to furnish him the same protection ordinarily furnished by the lien laws of the various states. The subcontractor, on the other hand, while nevertheless protected by the bond of the prime contractor, enjoys a direct contractual relationship with the prime contractor. As to such a subcontractor, therefore, there appears to be no valid reason to prevent him from entering into a subcontract with the prime contractor providing that disputes between them over amounts of money due shall be subject to arbitration.

Clearly, in enacting the United States Arbitration Act, the Congress intended and did announce a federal policy in favor of arbitration of disputes, and to hold that the present case is not subject to arbitration would clearly amount to an implied repeal of the Arbitration Act. No such implied repeal can be shown or inferred by the terms of the Miller Act or by its legislative history. Moreover, the opinion of the Court of Appeals in holding the Arbitration Act applicable in this case is consistent

with numerous decisions of this court holding that, "It is a cardinal principle of construction that repeals by implication are not favored. . . . The intention of the legislature to repeal 'must be clear and manifest.' . . . It is not sufficient . . . 'to establish that subsequent laws cover some or even all of the cases provided for by (the prior act); for they may be merely affirmative, or cumulative, or auxiliary.' There must be 'a positive repugnancy between the provisions of the new law, and those of the old.' " *Rosenberg* v. *United States*, 346, U. S. 371, 73 S. Ct. 1152, 97 L. Ed. 1607, 1619; citing *United States* v. *Borden Company*, 308 U. S. 188, 60 S. Ct. 182, 84 L. Ed. 181, 190.

2.

The provision of the Miller Act that suit be brought in the District Court where the work is performed relates to venue only and does not prevent arbitration.

The provision of the Miller Act requiring suit to be brought "in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere"[3] does not prevent arbitration. That such a provision merely relates to venue and does not constitute an integral and indispensable part of any right created by the Miller Act would appear to be clear from numerous cases wherein this court has been called upon to decide whether federal statutes requiring actions to be brought in a certain district relate to jurisdiction or venue.

In the case of *J. W. Lee* v. *Chesapeake and Ohio Railroad Company*, 260 U. S. 653, 67 L. Ed. 443, this court

[3] 40 USCA 270 (b).

construed 28 USCA 1391 (formerly Section 51 of the Judicial Code), which provides that a diversity action may be brought *only* in the district of residence of either the plaintiff or the defendant, and held that such requirement does not limit the jurisdiction of the district courts, but merely confers a personal privilege on the defendant, which he may assert or waive, at his election.

To the same effect are numerous other decisions of this court giving a venue construction to statutes rather than holding them jurisdictional, for example:

28 USCA 1402 (The Tucker Act), providing that suits against the United States of America shall be brought *only* in the district where the plaintiff resides, has been held by this court to be a mere venue provision; *United States* v. *Hvoslef*, 237 U. S. 1, 59 L. Ed. 813, 35 S. Ct. 459.

15 USCA 15 (The Clayton Act), which requires that a suit may be brought in the district "in which the defendant resides or is found or has an agent," has been held by this court to be a mere venue requirement; *Freeman* v. *Bee Machine Company*, 319 U. S. 448, 87 L. Ed. 1509, 63 S. Ct. 1146.

46 USCA 742 (suits in Admiralty Act), providing that libel in personam be brought against the United States and other defendants in a district wherein the plaintiff resides or the vessel is found, has been held by this court to be a venue provision; *Hoiness* v. *United States*, 335 U. S. 297, 93 L. Ed. 16, 69 S. Ct. 70.

46 USCA 688 (Merchant Marine Act), providing that the action of a seaman against his employer "shall be in the court of the district in which the defendant employer resides or in which its principal office is located," has been held to be a mere venue provision

Panama R. Co. v. *Johnson*, 264 U. S. 375, 68 L. Ed. 748, 44 S. Ct. 391.

While there are numerous other similar holdings by this court, there would be no point in merely compiling an exhaustive list. Although there is no decision of this court directly on point in Miller Act cases, the Courts of Appeal for two circuits have decided the question.

In the case of *Texas Construction Company* v. *United States of America for the use of Caldwell Foundry and Machine Company* (5th Cir.), 236 F. 2d 138, 143, the Court of Appeals for the Fifth Circuit held that:

> "... the requirement as to the district in which suit may be filed, contained in the Miller Act, is only one for the benefit of the defendants and may thus be waived by them, as may any other question of venue."

In the case of *Indemnity Insurance Company of North America* v. *United States of America for the use and benefit of Bailey-Lewis-Williams of Florida, Inc.*, 299 F. 2d 920, the Court of Appeals for the District of Columbia affirmed a judgment of the District Court for the District of Columbia (195 F. Sup. 752) and adopted the finding of the district court to the effect that the venue provision of the Miller Act confers a personal privilege on the defendant, who, at his election, may assert it or waive it.

While the two Court of Appeal decisions above cited would have no controlling effect on this court, they are well reasoned and persuasive.

Nothing to the contrary can be found in the cases cited by petitioner. Petitioner cites two cases arising under the Federal Employers Liability Act (*Boyd* v. *Grand Trunk Western Railroad Company*, 338 U. S. 263, 70 S.

Ct. 26, 94 L. Ed. 55; and *Pope* v. *Atlantic Coastline Railroad Company*, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094) as authority for the proposition that the provision of the Miller Act is jurisdictional and can not be waived. These cases are clearly distinguishable by the language of the Federal Employers Liability Act which contains an express "non-waiver" provision declaring void any "contract, rule, regulation or devise whatsoever, the intent or purpose of which shall be to enable any common carrier to exempt itself from any liability created by this Act."[4] Because of this specific non-waiver provision, this Court held in the *Grand Trunk Western Railroad Company* case, supra, that an agreement which had the effect of depriving a claimant of his rights under the Act was void; and in the *Atlantic Coastline Railroad Company* case, supra, that a Georgia court did not have the right to deprive a claimant resident of that state from maintaining a suit in a foreign state.

Equally distinguishable, and on the same basis, is the case of *Wilko* v. *Swan*, 346 U. S. 427, 74 S. Ct. 182, 98 L. Ed. 168, cited by petitioner in support of the same proposition. In that case this court, in interpreting the Securities Act of 1933, held void a contract signed by the customer of a securities house wherein he waived his right to sue, for the reason that the Securities Act of 1933 declared void any "condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision"[5] of the Act.

The Miller Act contains no such provision.

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[4]Federal Employers Liability Act, 45 USCA 55.
[5]Securities Act of 1933, 15 USCA 77 n.

3.

The decision of the Court of Appeals is in harmony with previous decisions of this Court.

In the case of *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 499, 55 S. Ct. 313, 79 L. Ed. 583, this court quoted with approval the opinion of Judge Learned Hand, wherein Judge Hand said:

"We see no reason for a limited construction (of the United States Arbitration Act) and conclude that Section 3 (the section of the Act authorizing a stay of proceedings) authorizes a stay even though the arbitration must take place beyond the jurisdiction of the court." (*Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 2nd Cir., 70 F. 2d 297)

That there is no jurisdictional conflict between the Arbitration Act and the Miller Act can also be demonstrated by the very language of the Arbitration Act. The Act does not provide that the federal court shall lose jurisdiction, but that the further exercise of such jurisdiction shall merely be stayed pending arbitration. Manifestly, therefore, a proper construction of the two Acts would appear to be that if the suit be brought within a district in which the contract was performed, as required by the provisions of the Miller Act, either party may move for a stay of the action in accordance with the provisions of the Arbitration Act, and the parties to the contract may then arbitrate in accordance with the contract entered into by both and at any place where both had agreed to so arbitrate, but finally and at last, the judgment of the arbitrators would be entered in proceedings in the original district court action. Such construction harmonizes the two acts and yet does not deprive either

party of the right to a judicial challenge of any errors in arbitration. Both parties to the contract would be able to attack in the District Court any irregularity which occurred in the arbitration proceedings.

Nothing held by this court in *Bernhardt* v. *Polygraphic Company of America*, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199, relied upon by petitioner, is contrary to this reasoning. In the *Bernhardt* case this court simply held that Section 3 of the Arbitration Act was applicable only to agreements for arbitration in maritime transactions and contracts evidencing transactions in commerce. In the *Bernhardt* case jurisdiction was not based upon a federal question but on diversity of citizenship, and this court held, therefore, that under the mandate of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, the right to arbitrate would depend on local law rather than federal law, the parties not being engaged in commerce nor in a maritime transaction.

4.

The decision of the Court of Appeals is in harmony with decisions of other Circuit Courts and no conflict exists.

Although petitioner says that the present case is in conflict with the decisions of other circuit courts, he cites no authority and, it is respectfully submitted, no conflict exists. On the contrary, the circuit courts have uniformly recognized the arbitrability of Miller Act cases.

In at least three Miller Act cases, *United States* v. *Bregman Construction Corporation*, 6th Cir., 256 F. 2d 851; *United States* v. *Al Con Development Corporation*, 4th Cir., 271 F. 2d 904; and *Agostini Bros. Building*

Corporation v. *United States*, 4th Cir., 142 F. 2d 854, other circuit courts have indicated that arbitration is allowable in a Miller Act case. While admittedly these cases are not controlling and do not squarely raise the point, they are certainly physical precedents, and significantly enough in the *Bregman* case the court categorically held that "without question, in a proper situation, the Arbitration Act applies in proceedings under the Miller Act."

5.

A Miller Act case is peculiarly suited to arbitration.

The Court of Appeals in its opinion in this case observed that if it could be shown that disputes arising under the Miller Act involved "complicated and sophisticated legal issues which can not readily be resolved by arbitrators untrained in the law," then perhaps some merit might be found in petitioner's argument that Miller Act suits are not subject to arbitration. It is interesting to note that this court in the case of *Wilko* v. *Swan*, supra, listed, as illustrating a situation peculiarly suited to arbitration, a case where "the amount of money due under a contract" was involved,[6] and cited *Agostini Bros. Bldg. Corp.* v. *United States*, supra, a case decided by the Fourth Circuit wherein a Miller Act suit was arbitrated. The case at bar, as do virtually all Miller Act cases, turns primarily on "the amount of money due under a contract," and would therefore appear to be, as this court says, one peculiarly suited for arbitration.

[6]Wilko v. Swan, 346 U.S. 427, 436; 74 S. Ct. 182; 98 L. Ed. 168, 176

6.

The contract in question evidences a transaction involving commerce.

The Court of Appeals held, and it is undisputed in the record, that "a New York corporation contracted with appellee, a Georgia corporation, to do the work within the State of Georgia; that appellant sent substantial supervisory personnel across the state lines, and received supplies and equipment across state lines. Working on the projects were subcontractors from states other than Georgia. Moreover, the facility involved is an integral part of a transcontinental system joined and holding hands with facilities already in commerce in other states and countries by radio and telephone communications, and further joined with numerous other military bases already in commerce from almost the North Pole to Puerto Rico forming a single giant network of air bases and communication facilities." (R. 127, Footnote 3)

Contrary to the argument advanced by petitioner, this court rejected the theory that a war instrument is excluded from interstate commerce in the case of *Powell* v. *United States Cartridge Company*, 339 U. S. 497, 94 L. Ed. 1017. This court has also rejected the "new construction" doctrine and on at least two occasions has held that contracts involving work substantially identical to that in the case at bar involved interstate commerce. The two cases in point are *Mitchell* v. *Lublin, McGaughy & Associates, et al.*, 358 U. S. 207, 3 L. Ed. 2d 243, and *Mitchell* v. *C. W. Vollmer & Company*, 349 U. S. 427, 99 L. Ed. 1196.

In this connection see also the case of *Metro Indus-*

trial Painting Corp. et al. v. *Terminal Construction Company, Inc.*, 2nd Cir., 287 F. 2d 382, involving facts almost identical to the case at bar; and see also the case of *Goldberg, et al.* v. *Five Boro Construction Corp.*, 291 F. 2d 371, wherein the Court of Appeals for the First Circuit in a case involving respondent, Electronic & Missile Facilities, Inc. (at a time when its name was Five Boro Construction Corporation) specifically held this very company to be in commerce while engaged on a project similar in every respect to the project involved under the contracts in the case at bar.

7.

The allegations of fraud do not prevent a stay for the purpose of arbitration.

It is not disputed that petitioner completed his contract before insisting that he was entitled to rescind, and it also appears that he had before him during the course of the work all facts which might give him a right to rescind. The Court of Appeals correctly decided that "Under federal law, arbitration is not barred by an assertion that the entire contract was induced by fraud; there must be a specific claim that the arbitration provision was fraudulently procured, *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.* (2d Cir.) 271 F. 2d 402."

In the *Lawrence* v. *Devonshire* case, supra, Judge Medina, speaking for the Second Circuit, based this reasoning on the fact that the Arbitration Act "is substantive, not procedural, in character and that it encompasses questions of interpretation and construction, as well as questions of validity, revokability and enforceability of arbitration agreements affecting interstate commerce or

maritime affairs, since these two types of legal questions are inextricably intertwined." (271 F. 2d 402, 409.)

This reasoning of the Second Circuit is, in turn, soundly based on the decision of this court in *Bernhardt* v. *Polygraphic Company of America*, 350 U. S. 198 (100 L. Ed. 199), wherein this court held that arbitration, while possibly "procedural" for certain purposes, was "substantive" in cases founded solely on diversity of citizenship. Thus, there would be no constitutional basis for application of the Arbitration Act in diversity cases and state law would control. On the other hand, in the same opinion, this court held that the "stay" provisions of the Arbitration Act (Section 3) must be read together with Sections 1 and 2 (the sections making agreements to arbitrate valid, irrevocable, and enforceable) thereby holding, in effect, that the Arbitration Act is in reality a substantive federal law, constitutionally based on the commerce power. Under such reasoning, and in the absence of an allegation of fraud in the procurement of the arbitration provision, such arbitration would be irrevocable, valid and enforceable, and all other questions of fraud could be determined in the arbitration proceeding.

In the case at bar, however, it makes little difference whether this court adopts the reasoning of the Court of Appeals or whether the law of Georgia be applied on the question of fraud. Under the doctrine of election of remedies, petitioner has clearly elected to stand on the contract rather than to rescind.

While petitioner claims the right to rescind because of "fraud," even a superficial examination of his complaint and the contracts will show that every act which he seeks to designate as "fraud" is one which the orig-

inal contract, bearing petitioner's signature, expressly permits.

For example, the first allegation of fraud charged against respondent is in representing "that it was a general contractor," whereas appellant in fact "intended to and did subcontract substantially all of the work." (R. 9) How does this affect petitioner and how could it constitute fraud? Why couldn't respondent sublet the contract if it saw fit to do so? The second allegation of fraud is that respondent "inserted into its printed subcontract form provisions purporting to authorize it to require Moseley or other subcontractors to do any work whatever which they were directed by said defendant to do, regardless of whether it bore any proper relation to the work called for in the main typewritten portion of such contract." (R. 9 and 10) Is petitioner saying he didn't read this portion of the contract before he signed it? The third allegation of fraud is that the respondent gave to petitioner "numerous work directives during the course of the work contending at the time and contending now that the work called for in such directives was covered by Moseley's subcontract, whereas in truth and in fact said defendant knew such work was not so covered." (R. 10) Then why didn't petitioner refuse to do the work and seek rescission then? The next charge is that respondent "issued a large number of said work directives so as to greatly increase the amount of work to be done" by petitioner, thereby increasing his capital outlay and producing financial pressure (R. 10) upon him with the intention of forcing him to settle with appellant. Again, why didn't appellee rescind or attempt to do so at the time? Finally, it is charged that the arbitration provision was inserted in the contract by respondent in order to

"obtain working materials without paying therefor." (R. 11) If arbitration be looked upon with favor by the courts, how then can the mere insertion of an arbitration clause in a contract, whereby disputes may be settled by that method, be an act of fraud?

All of the allegations of fraud are of the same character. Without further elaboration or illustration, we simply say that none of the allegations charge anything more than a dispute over the exercise of rights either expressly authorized by the contract or which one party said were authorized and the other denied.

All of these contentions were known to the petitioner either at the signing of the contract or during the course of performance so that these charges, when coupled with the allegation that the work was thereafter completed, clearly disclose that any right to rescind which may have existed was waived by petitioner long before the present suit was filed.

Under these circumstances it is unnecessary to consider whether the complaint would have justified rescission at any time. In other words if it were conceded, as it is not, that petitioner ever had a right to rescind, the law clearly is that he lost his right to do so by failing to act promptly, leaving no doubt as to his election, and adhering to the position taken. *City and County of San Francisco* v. *Transbay Const. Co.* (9th Cir.) 134 F. 2d 468; *Barnett et al.* v. *Beggs* (8th Cir.) 208 F. 255; *Jack Mann Chevrolet Co.* v. *Associates Inv. Co.*, 125 F. 2d 778; *Pearson* v. *George*, 209 Ga. 938, 945 (77 S. E. 2d 1).

As is said in *3 Williston, Contracts*, Section 688:

> "The principle is in general that wherever a contract *not already fully performed* on either side is

continued in spite of a known excuse, the defense thereupon is lost and the injured party himself is liable if he subsequently fails to perform." (emphasis supplied)

The same principle stated in another form is that:

"The right to rescind, abrogate, or cancel a contract must be exercised promptly on discovery of the facts from which it arises; it may be waivered by continuing to treat the contract as a subsisting obligation."

— 12 *Am. Jur.* 1029, (Contracts), Sec. 447.

"The party to a contract who, after discovery or knowledge of facts which would entitle him to rescind, treats the contracts as a subsisting obligation and leads the other party to believe that the contract is still in effect waives his right to rescind."

— 12 *Am. Jur.* 1030, (Contracts), Sec. 449.

CONCLUSION

The subcontract sued on in this case (R. 17) appears to be substantially identical with those in common use on government projects and widely used in the construction trade. Its arbitration provisions as to time, place and manner are so routine as to be commonplace, and the conclusions and self-serving declarations of petitioner's original complaint raises issues which appear in virtually every construction controversy. Presumably, petitioner read the contract before it was signed, and his original complaint points out no provision of it about which he could not have informed himself before it was made. Even after he must have discovered what he now says is fraud, he elected to treat the contract as valid and sub-

sisting and continued performance without any effort to rescind.

Finally, the controversy is of a type peculiarly suited to arbitration, and if arbitration is to be refused or prohibited in such a case, then many of the salutary benefits of all arbitration agreements will be lost and the calendars of the district courts will be further congested. We respectfully submit that neither the legislative history disclosed nor the merits of petitioner's case require or justify such result.

Respectfully submitted,

NEWELL EDENFIELD

WILLIAM H. MAJOR

LAMAR W. SIZEMORE
Attorneys for Respondents.

Of Counsel:

BUCHANAN, EDENFIELD & SIZEMORE
715 Citizens & Southern Bank Building
Atlanta 3, Georgia

APPENDIX

A.

Provisions of the United States Arbitration Act
9 USCA Secs. 1, 2 and 3.

1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

2. Validity, irrevocability and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be

valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

3. Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

B.

Provisions of Miller Act
40 USCA 270-b

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, that any person having direct

contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such persons did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit."